NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

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REPORT OF THE GENERAL COUNSEL

This report covers selected cases of interest that were decided during the period from October 1, 1994 through December 31, 1994. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

Fred Feinstein
General Counsel

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Individual Employee Complaints As Concerted Activity

In our first reported case, we decided to authorize a complaint in order to place before the Board the question of whether complaints by an individual employee concerning safety conditions constituted protected concerted activity, even if such complaints were made without the knowledge or authorization of other unit employees.

We recognized that under Meyers Industries II, 281 NLRB 882, supplementing Meyers I, 268 NLRB 493 (1984), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. den. 487 U.S. 1205 (1988), the employee was not engaged in concerted activities when he made his safety complaints because there was no evidence that he was acting in concert or had the support of other unit employees. Meyers overruled the line of cases following Alleluia Cushion Co., 221 NLRB 999 (1975). In Alleluia Cushion, the Board had held that consent and concert of action emanated from the mere assertion of statutory rights. The absence of evidence that fellow employees disavowed such representation was implied consent for the employee's activities, especially where the individual activity involved a group concern. In our case, the Charging Party had complained to the Employer about unsafe working conditions, a matter of group concern. Therefore, his activity could be considered concerted only under Alleluia Cushion.

When Meyers overruled Alleluia Cushion, the Board noted, in Meyers II at 883, that its definition of concerted activity was a policy decision, not mandated by the Act. Moreover, in a recent Board decision, Liberty Natural Products, 314 NLRB 631 fn. 4 (1994), Chairman Gould and Member Browning questioned "the continuing vitality" of Meyers. In these circumstances, we decided that complaint should issue in this case, relying on Alleluia Cushion, to place before the Board the issue of whether the Charging Party's individual complaints about safe working conditions should be considered concerted.

Subcontractor Employer Handbilling On Employer Private Property

A rather unusual case involved the protectedness of handbilling on an employer's property by employees working for the employer's subcontractor.

The employees worked for a nonunion subcontractor that was involved in the renovation of the Employer's department store, located in a large shopping mall. The Union requested recognition by the subcontractor, claiming to represent a majority of its employees, but the subcontractor declined, expressing doubt of the Union's majority status.

During their lunch hour the next day three employees of the subcontractor attempted to distribute handbills at the mall entrance of the Employer's store to inform the store's customers of their dispute with the subcontractor. As they approached the store the Employer's security guard told them they could not handbill on the Employer's property and would be arrested if they did so. The employees were informed that the store's policy prohibited the distribution of handbills or other publicity materials on its premises by any organization for any purpose. The employees were directed to a public right-of-way where they could conduct their handbilling.

Nevertheless, the employees continued to handbill at the store's entrance during their lunch breaks. Finally, when they refused to leave the entrance, the Employer summoned city police, who told the employees they were trespassing, escorted them away from the store, and told them not to return to the Employer's property. The next day, however, the local district attorney agreed that the police would remain neutral as long as the dispute involved invited employees, and the police escorted the employees back to their jobs. The contractor put them back to work but declined to pay them for the time they had missed.

We concluded that the Employer had violated Section 8(a)(1) by threatening the employees with arrest and by having them removed from its property because of their handbilling activities.

In Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992), the Supreme Court held that an employer could deny non-employee union agents access to its private property for the purpose of organizing employees. Accordingly, the Court rejected the Board's application of its "balancing" test, as announced in Jean Country, 291 NLRB 11 (1988), to non-employee activity on an employer's private property. However, the Court affirmed that when the activity is being conducted by the employer's own employees, the employer's right to control use of its property must be balanced against the employees' protected right to engage in Section 7 activity.

In A-1 Schmidlin Plumbing & Heating Co., 312 NLRB 201(1993), the Board applied a Jean Country balancing analysis in holding that an employer could not prohibit an unlawfully discharged employee from distributing handbills on its parking lot. The Board stated that Lechmere was inapplicable to situations involving ``an

employee/discriminatee seeking access for the purpose of communicating with the public concerning the Employer's unfair labor practices." 312 NLRB at 201, n.3. And in Nashville Plastic Products, 313 NLRB 462 (1993), the Board squarely rejected the contention that Lechmere was applicable to off-duty employees seeking access to fellow employees, commenting that "an off-duty employee is [not] a 'stranger' . . . to the property nor to the employees working there, . . ." Id. at 463.

We concluded that, while the handbillers herein were not employees of the Employer, they also were not "strangers" to the Employer's property like the union organizers in Lechmere. In this respect, in CDK Contracting Co., 308 NLRB 1117 (1992), a case involving contractual access rights of union agents representing employees of a subcontractor, the Board stated: "the Respondent, by soliciting other employers to perform work at the jobsite, invited subcontractors onto the jobsite, and thus subjected its property rights to the Union's contractual access rights with those subcontractors." Similarly, by agreeing to have the work in question performed by the employees of the nonunion subcontractor, the Employer here was deemed to have "invited" the employees onto its property and to have subjected its property rights to the employees' dispute with their own employer. Thus, the Employer's property was their only work site and the situs of the dispute at the time their employer refused to recognize their union. Accordingly, we decided that it was more appropriate to apply the balancing test of Jean Country rather than the exclusionary principles of Lechmere.

Applying Jean Country, we concluded that the Employer's right to control access to its property had to yield to the statutory right of the employees to publicize their dispute at its situs. The Employer has a significant property interest in its store and the sidewalk and parking lot in front of it. However, such interest is less substantial than that of an employer in a more private retail setting. See, e.g., Target Stores, 292 NLRB 933, 935 (1989). Indeed, in the context of shopping malls, the Board views the private property right as "relatively weak." See, e.g., Galleria Joint Venture, 303 NLRB 815, 818 (1991); Emery Realty, Inc., 286 NLRB 372, 374 (1987), enfd. 863 F. 2d 1259 (6th Cir. 1988). Further, although the Employer had a posted no-solicitation, no-distribution rule, that rule was overly broad in that it prohibited employees from engaging in protected Section 7 activity in nonwork areas during nonwork time. Thus, it could not be concluded that the Employer's property interest during the time period in question was "more substantial than that of similar retail enterprises with no restrictions at all." Target Stores, supra, at 935.

The employees here were engaged in area standards handbilling directed at the Employer's customers. Area standards handbilling has been found by the Board to be a relatively weak Section 7 right, but certainly valid and worthy of protection against substantial impairment. Target Stores, 300 NLRB 964, 969-970 (1990); Hardee's Food Systems, Inc., 294 NLRB 642, 643 (1989). Moreover, the handbilling here was conducted by employees whose wages personally were at issue. Also, the handbillers were limited in number and their conduct was at all times peaceful and nonobstructive. Cf. Target Stores, 292 NLRB 933, 935 (1989).

With respect to the suitability of the public right-of-way as an alternative means of access to the store's customers, that area was adjacent to a public highway with a speed limit of 45 mph; there were no stop signs at the entrance to the mall property from the highway; and the driver's side of vehicles entering the mall from the highway was opposite to the grassy strip. The Board has rejected handbilling under similar circumstances as an unreasonable option. W.S. Butterfield Theatres, 292 NLRB 30, 33 (1988); Sentry Markets, 296 NLRB 40 (1989), enf'd. 914 F. 2d 113 (7th Cir. 1990). Apart from safety concerns, perimeter handbilling along the roadsides would have enmeshed mall shoppers generally in the dispute since the handbillers had no way of determining whether a vehicle's driver was intending to shop at the Employer's or at more than 30 other stores in the mall. Jean Country, supra, at 18.

Based on the above analysis, we concluded that the balance should be struck in favor of the handbilling. Accordingly, the Employer's prohibition of the handbilling and its causing the removal of the handbillers from its property was deemed violative of Section 8(a)(1). As part of the remedy we sought an order requiring the Employer to make the employees whole for wages lost as a result of its having them removed from its premises.

Discriminatory Denial of Access

In a series of cases, we were called upon to determine whether employers had discriminated against union solicitation at individual store locations.

The Employers operated chains of retail grocery supermarkets which were nonunion. Employer A maintained a no-solicitation rule which established a procedure for groups seeking permission to solicit on the Employer's property. Pursuant to this procedure, in 1993 the Salvation Army was granted permission to solicit in front of all of Employer A's stores throughout the Christmas season. However, as to other organizations seeking permission to

solicit at individual stores, the policy was not uniformly interpreted or applied by the store managers. Thus, at some of the stores, no other solicitation had been permitted, while at others, there were isolated, negligible incidents at most.

At one of the stores, however, in addition to the Salvation Army bell ringer, a Toys For Tots solicitation had occurred in the parking lot for one day; there was a weekend solicitation of support for Big Brothers and Sisters; and a local church and the high school band had been permitted to sell raffle tickets one day.

In November 1993 nonemployee Union representatives attempted to handbill at the entrance to the above store, which was located in a "strip" mall. The handbill read: "This store is non-union. Please do not patronize. Please shop union stores." Listed on the back were several area stores that employed Union members. The store manager told the handbillers they were trespassing and had to leave. The handbillers refused and the Employer summoned the county sheriff, who told the handbillers that they had to move to a grassy knoll area near the highway. No one walked through that area and vehicles were not easily accessible from there. The handbillers returned to the store the next day and were again told to move to the knoll area.

The handbillers noted that the Salvation Army and Toys For Tots solicitations were being conducted on the Employer's property at the times they were being denied permission to handbill. While the Employer never informed the Union of its procedure for obtaining permission to solicit on its premises, the Salvation Army bell ringer told the handbillers that it was necessary to seek advance written permission from each store manager. The Union wrote the store manager requesting permission to handbill in front of the store, but the manager never responded to the Union's request.

As for Employer B, the Union began a campaign to organize all its stores in November 1993. However, the Employer refused to permit Union agents to solicit off-duty employees on the sidewalks, roadways, or parking lots in front of or surrounding the Employer's stores. The Employer cited its no-solicitation policy, which provided, in pertinent part:

> There must be no solicitation or distribution of literature ofany kind by persons in customer service areas of the storeduring those hours when the store is open for business.

The Employer had permitted the Salvation Army to solicit in front of all its stores during the Christmas holidays. In

addition, at one of the stores a Cub Scout Pack was permitted to set up a table to sell Christmas gift items during the season. Various solicitations occurring at other stores included the "sale" by on-duty store employees of Shamrocks for Muscular Dystrophy, the maintenance of a "community bulletin board" containing a wide range of solicitations, and the placing of unmanned barrels to collect food items on behalf of a local charity.

While the Supreme Court held in Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992), that an employer may lawfully restrict nonemployee access to its property, an employer may not discriminate against a union by denying it access while permitting it to others. Davis Supermarkets, 306 NLRB 426 (1992). However, it is not unlawful for an employer to bar union solicitation while permitting a small number of isolated "beneficent acts" as narrow exceptions to its no-solicitation rule. Rather than finding an exception for charities to be per se unlawful, the Board evaluates the "quantum of incidents" involved to determine whether unlawful discrimination has occurred. See Hammary Manufacturing Corp., 265 NLRB 57 (1982), where an employee no-solicitation rule was found to be lawful even though the rule, on its face, made a single exception for solicitations by the United Way campaign. See also, Galleria Joint Venture, 303 NLRB 815, 818-819, note 11 (1991),and Sentry Supermarkets, Inc., 296 NLRB 40, 42 (1989), where it is indicated that solicitation by the Salvation Army, by itself, is not sufficient to establish unlawful disparate treatment.

In the instant cases, we rejected the notion that each chain of stores should be treated as a single entity for purposes of determining whether there had been such a "quantum of incidents" of charitable solicitation as to warrant a finding of unlawful discrimination against union solicitation. Rather, each individual store was considered a separate employing entity for such purposes. Thus, while the Salvation Army had been permitted to solicit at all the stores involved here, that circumstance did not warrant a finding of disparate treatment. Hammary Manufacturing, supra; Galleria Joint Venture, supra.

With respect to the stores individually, with two exceptions, we concluded that there were insufficient incidents of solicitation in addition to that of Salvation Army to justify a finding of unlawful discrimination. Indeed, except for the one store, Employer A's stores had permitted virtually no nonemployee solicitation other than Salvation Army. As for Employer B, its sale of Shamrocks, maintenance of community bulletin boards and the unmanned

food collection barrel were not viewed as the kind of in person solicitation to be considered in determining whether there was a sufficient quantum of incidents to warrant a finding of discrimination against nonemployees.

However, as noted earlier, at one store of Employer A, in addition to Salvation Army, solicitations were permitted in behalf of Toys For Tots and Big Brothers and Sisters, as well as a local church and a high school band. At the one store of Employer B, substantial solicitation was permitted by Cub Scouts as well as Salvation Army. These circumstances were considered more than isolated in nature and were deemed to constitute a sufficient "quantum of incidents" to warrant a finding of unlawful discrimination against union solicitation in violation of Section 8(a)(1).

EMPLOYER DISCRIMINATION

Threats to Discipline For Honoring Picket Line

In one case, we considered whether an employer could lawfully discipline its employees for refusing to load a truck at the employer's loading dock while the truck was being picketed at the employer's gate some distance away.

The employees who handled the loading of materials were covered by a collective-bargaining agreement between the Employer and the Union. The agreement contained a no-strike provision which included the following clause:

Picket-Line. It shall not be a violation of this agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in an authorized labor dispute or refuses to go through or work behind any lawful primary picket line, including the picket line of the union party to this agreement and including picket lines at the Employer's place of business. Furthermore, any employee may refuse to cross any picket line when he has a reasonable basis for fearing that bodily harm will be done to him. An authorized labor dispute, for the purposes of the foregoing, shall include an area standards picket line, but shall not include other informational, secondary or jurisdictional picket lines. (Emphasis supplied.)

The employees' Union, seeking to be recognized by a trucking company, mounted a campaign of ambulatory recognitional picketing of that company's trucks. The Union advised the instant Employer of its campaign and its intent to picket the trucks if they made pick-ups at the Employer's business. In response, the Employer issued a memo to its employees advising that the Union's dispute did not involve

the Employer, that they were therefore required by the contract to continue to work despite any such picketing, and that their failure to do so could result in discipline, including discharge.

The Employer also established a separate, reserved gate for the exclusive use of the trucking company. The gate was clearly marked and situated near the entrance to the Employer's property, a considerable distance from the loading docks. When the company's truck appeared, the Union picketed only at this gate, with signs indicating that it was picketing the trucking company for recognition. The picketing was confined to times when the company's truck was on the premises.

The Union advised the employees at the site that the picket was "a legal picket," and that it was up to the employees, but that the Union would prefer that they not load the trucking company's trucks. One employee refused to load the truck until threatened with discharge, and another was issued a disciplinary suspension for refusing to load the truck.

The question whether the employees could lawfully be disciplined for refusing to load the truck turned on several considerations. An employee has a protected right to honor the picket line of his own union which is set up at its own employer's place of business but is directed at a stranger employer doing work on the premises. See, e.g., Gould, Inc., 238 NLRB 618, 622 (1978), enfd. 638 F.2d 159 (10th Cir. 1980), wherein the Court of Appeals, in enforcing the Board's decision, stated that to deny an employee the right to honor a lawful picket line at his employer's place of business even if it is directed at a stranger employer would deny employees the right to engage in the normal response to primary picketing that makes primary picketing effective. Since the employees herein had not refused to perform all work for their Employer, but only had refused to load the picketed truck, the instant case was distinguishable from cases such as Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), and Bricklayers Local No. 2, 224 NLRB 1021 (1976), where in a similar context employee refusals to perform any work for their own employer were held unprotected.

Further, the Union did not attempt to shut down the Employer by engaging in secondary picketing or other secondary pressure. To the contrary, the Union confined its picketing to the reserved gate and did not follow the truck onto the site to picket "between the headlights." Thus, the fact that there was no picketer physically proximate to the truck waiting to be loaded did not belie the fact that the truck was an object of picketing by the employees' own Union. Cf., Congoleum Industries, Inc., 197 NLRB 534, 547

(1972), where the administrative law judge rejected the contention that employees had not engaged in protected activity in refusing to cross a picket line, since the pickets were at a reserved gate and the employees could have entered the site through the neutral gate. The judge stated: "I regard this contention as a quibble and without merit. It cannot be gainsaid that Respondent's plant was being picketed, regardless of whether the pickets actually were on or between the roadways leading to the plant."

Nor was the Union's picketing converted into unlawful secondary activity as a consequence of the Union's statements to individual employees that, while the decision was theirs, the Union would prefer that they did not load the truck. Such statements clearly were lawful under International Rice Milling Co., Inc. v. NLRB, 341 U.S. 665 (1951), where the Supreme Court held that otherwise lawful primary picketing was not converted into prohibited secondary conduct by the pickets' appeals to drivers of neutral employers not to cross the picket line. Consistent with International Rice Milling, the Board has held that a union may lawfully induce members working for neutral employers not to deliver newspapers to a company with which the union had a dispute, since such inducements "invited action only at the premises of the primary employers." Interboro News Co., 90 NLRB 2135 (1950). The Board has also held that a union did not engage in unlawful secondary activity by telling its members, in response to telephone inquiries, that a picket line of a sister local should be observed. Milwaukee Plywood Co., 126 NLRB 650 (1960). See also, Mega Van & Storage, 294 NLRB 975, 977 (1989), where the administrative law judge, in rejecting an argument analogous to that being considered here, stated: "It is, however, well settled that a primary picket line is not rendered unlawful because a union induces others to honor the picket line."

We accordingly concluded that the truck was the object of lawful primary picketing and that the employees, in response to the Union's appeals, had a protected right under the Act to refuse to load the truck. The question remained, however, whether the "picket line" provisions of the no-strike clause constituted a waiver of that right. In this respect, while the definition of a "lawful primary picket line" set forth in the contract expressly included an area standards picket line and excluded information, secondary or jurisdictional picket lines, no mention is made of a recognitional picket line as was here involved. As the contract provision therefore was at least ambiguous as to this issue we decided that the case appropriately should be deferred to the parties' grievance arbitration procedures pursuant to the policy announced in Collyer Insulated Wire, 192 NLRB 837 (1971).

In one case, we considered whether an employer could lawfully discipline its employees for refusing to load a truck at the employer's loading dock while the truck was being picketed at the employer's gate some distance away.

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The Employer also established a separate, reserved gate for the exclusive use of the trucking company. The gate was clearly marked and situated near the entrance to the Employer's property, a considerable distance from the loading docks. When the company's truck appeared, the Union picketed only at this gate, with signs indicating that it was picketing the trucking company for recognition. The picketing was confined to times when the company's truck was on the premises.

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load the trucking company's trucks. One employee refused to load the truck until threatened with discharge, and another was issued a disciplinary suspension for refusing to load the truck.

The question whether the employees could lawfully be disciplined for refusing to load the truck turned on several considerations. An employee has a protected right to honor the picket line of his own union which is set up at its own employer's place of business but is directed at a stranger employer doing work on the premises. See, e.g., Gould, Inc., 238 NLRB 618, 622 (1978), enfd. 638 F.2d 159 (10th Cir. 1980), wherein the Court of Appeals, in enforcing the Board's decision, stated that to deny an employee the right to honor a lawful picket line at his employer's place of business even if it is directed at a stranger employer would deny employees the right to engage in the normal response to primary picketing that makes primary picketing effective. Since the employees herein had not refused to perform all work for their Employer, but only had refused to load the picketed truck, the instant case was distinguishable from cases such as Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), and Bricklayers Local No. 2, 224 NLRB 1021 (1976), where in a similar context employee refusals to perform any work for their own employer were held unprotected.

Further, the Union did not attempt to shut down the Employer by engaging in secondary picketing or other secondary pressure. To the contrary, the Union confined its picketing to the reserved gate and did not follow the truck onto the site to picket "between the headlights." Thus, the fact that there was no picketer physically proximate to the truck waiting to be loaded did not belie the fact that the truck was an object of picketing by the employees' own Union. Cf., Congoleum Industries, Inc., 197 NLRB 534, 547 (1972), where the administrative law judge rejected the contention that employees had not engaged in protected activity in refusing to cross a picket line, since the pickets were at a reserved gate and the employees could have entered the site through the neutral gate. The judge stated: "I regard this contention as a quibble and without merit. It cannot be gainsaid that Respondent's plant was being picketed, regardless of whether the pickets actually were on or between the roadways leading to the plant."

Nor was the Union's picketing converted into unlawful secondary activity as a consequence of the Union's statements to individual employees that, while the decision was theirs, the Union would prefer that they did not load the truck. Such statements clearly were lawful under International Rice Milling Co., Inc. v. NLRB, 341 U.S. 665 (1951), where the Supreme Court held that otherwise lawful primary picketing was not converted into prohibited

secondary conduct by the pickets' appeals to drivers of neutral employers not to cross the picket line. Consistent with International Rice Milling, the Board has held that a union may lawfully induce members working for neutral employers not to deliver newspapers to a company with which the union had a dispute, since such inducements "invited action only at the premises of the primary employers." Interboro News Co., 90 NLRB 2135 (1950). The Board has also held that a union did not engage in unlawful secondary activity by telling its members, in response to telephone inquiries, that a picket line of a sister local should be observed. Milwaukee Plywood Co., 126 NLRB 650 (1960). See also, Mega Van & Storage, 294 NLRB 975, 977 (1989), where the administrative law judge, in rejecting an argument analogous to that being considered here, stated: "It is, however, well settled that a primary picket line is not rendered unlawful because a union induces others to honor the picket line."

We accordingly concluded that the truck was the object of lawful primary picketing and that the employees, in response to the Union's appeals, had a protected right under the Act to refuse to load the truck. The question remained, however, whether the "picket line" provisions of the no-strike clause constituted a waiver of that right. In this respect, while the definition of a "lawful primary picket line" set forth in the contract expressly included an area standards picket line and excluded information, secondary or jurisdictional picket lines, no mention is made of a recognitional picket line as was here involved. As the contract provision therefore was at least ambiguous as to this issue we decided that the case appropriately should be deferred to the parties' grievance arbitration procedures pursuant to the policy announced in Collyer Insulated Wire, 192 NLRB 837 (1971).

Permanently Subcontracting Unit Work After a Lockout

In another case, we considered whether an Employer had violated either Section 8(a)(3) or (5) of the Act by permanently subcontracting unit work after locking out its employees.

The Employer and the Union had engaged in extensive contract renewal negotiations without reaching agreement. The contract expired in August 1992 and the parties thereafter reached impasse in November 1992. The Employer implemented its final offer and negotiations ceased.

The Union never mounted a strike in support of its bargaining position. However, in the ensuring months various acts of apparent sabotage began occurring at the plant. Such acts included the destruction or disabling of

machinery, product samples, and production records. There was product contamination, including the intentional placement of scrap metals and other debris into products ready for shipment to customers. However, the most serious conduct involved the pouring of pollutants into the plant sewage and drainage system, thereby creating environmental hazards. As a result, in June 1993 the local sanitary district complained about the level of pollutants being released from the plant and threatened the Employer with substantial fines and penalties and possible revocation of it operating permits. Upon receipt of the warning, the Employer locked out the bargaining unit employees, advising the Union that it was forced to take over operation of the plant because of the sabotage.

In the interim, in May 1993 the Employer had advised the Union of tentative plans to discontinue certain processing operations and the contract out certain maintenance functions being performed by unit personnel. The Employer explained that its processing equipment was too old and inefficient for the Employer to remain competitive in marketing the products involved, that the cost of replacing such equipment was prohibitive, and that the Employer would be better served having such work performed by an outside processor. With respect to the maintenance functions, the Employer explained that the proposed subcontracting of this work would substantially reduce the Employer's need for working capital through the elimination of its parts inventory and the attendant administrative and paper work. The Employer offered to bargain respecting these decisions and their impact on employees.

Throughout July and August 1993 the parties met to discuss these issues. Ultimately, however, the union was unable to come up with any meaningful alternatives to the Employer's proposals, the discussions ended, and the Employer implemented the changes as proposed, resulting in the layoffs of 14 unit employees.

We concluded that the Employer had violated neither Section 8(a)(3) nor (5) of the Act by subcontracting unit work after locking out unit employees.

First, in view of the numerous acts of sabotage in the plant, the Employer's response was deemed to be a lawful defensive lockout, and thus did not violate Section 8(a)(3). See, Johns Manville Products, 223 NLRB 1317, 1318 (1976), enf. denied 557 F.2d 1126 (5th Cir. 1977), cert. denied 436 U.S. 956 (1978). Further, the evidence showed that the Employer had contemplated the subcontracting and had initiated bargaining before it locked out the employees, and that it would have taken such action even absent the lockout. The Employer furnished the Union information relevant to its proposals, continued to meet, and did not implement the proposals until the bargaining had ended. Thus, it could not be concluded that the subcontracting

proposal was a consequence of the lockout or that the Employer's decisions were in any way influenced by the lockout.

Under Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), the Employer was under an obligation to bargain with the Union over its decision to subcontract the maintenance work. No such duty was owed with respect to the decision to discontinue the processing operations inasmuch as, under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), that decision was entrepreneurial, affecting the scope and direction of the business, and therefore not a mandatory subject of bargaining. In any event, the Employer had bargained fully with the Union with respect to both decisions and was therefore privileged to put them into effect by subcontracting the work.

Finally, we rejected the contention that the implementation of the proposals was "inherently destructive of employee rights" and therefore violative of Section 8(a)(3) within the contemplation of NLRB v. Great Dane Trailers, 388 U.S. 26 (1967), and related cases. The subcontracting here was not the type of conduct "which would inevitably hinder future bargaining and create visible and continuing obstacles to the future exercise of employee rights." D & S Leasing, Inc., 299 NLRB 658, 661 (1990), enfd. sub nom NLRB v. Centra, 954 F.2d 366 (6th Cir. 1992). Rather, the Employer had demonstrated legitimate and substantial business justifications for its decisions as well as a willingness to bargain over them. Nor could it be said that the subcontracting had destroyed all or a substantial part of the bargaining unit, thereby damaging the collective bargaining process, since it affected only 14 jobs in a unit of over 700 employees. See, Metropolitan Edison v. NLRB, 460 U.S. 693 (1983).

Accordingly, we refused to issue complaint in this matter.

Supervisory Status of Charge Nurses

During this quarter, we briefed to the Board, as amicus curiae, issues regarding the supervisory status of charge nurses raised by the Supreme Court's decision in NLRB v. Health Care & Retirement Corp., ___ U.S. ___, 114 S.Ct. 1778 (1994).

Prior to Health Care, the Board had viewed professionals who "assigned" or "responsibly directed" employees in furtherance of their professional duties as not acting "in the interest of the employer" as that phrase is used in Section 2(11). The Supreme Court in Health Care, however, held that Section 2(11) requires the Board to address three questions in determining supervisory status:

> "First, does the employee have authority to engage in one of the 12 listed activities? Second, does the exercise of that authority require 'the use of independent judgment'? Third, does the employee hold the authority 'in the interest of the employer'?"

Health Care, supra, 114 S.Ct. at 1780.

The Court in Health Care thus rejected the Board's test for determining when health care workers were exercising authority "in the interest of the employer." However, the Court did not rule on the Board's determination of the first two questions. Indeed, the Court acknowledged that the Board is owed deference in defining such phrases as "assign," "responsibly to direct," and "independent judgment."

We decided to argue to the Board, based on the language of Section 2(11), the legislative history underlying the Congressional enactment of Section 2(11), and Board cases outside the health care industry, that the authority of skilled health care workers to direct other less-skilled employees how to perform specific tasks, or to assign them to those tasks, is not "responsible direction" or "assignment" as contemplated by the statute. In our view, something more managerial in nature is needed. "Responsible direction" would include the authority to define the overall job of another such as, for example, requiring an aide to work overtime or to report to work in the event of staff shortages. Similarly, the term "assign" should encompass matters such as the initial determination as to where, and on what shift, an employee is to work, or subsequent changes in the employee's shift or work station.

Further, even if health care workers assign or responsibly direct others within the meaning of Section 2(11), they are not statutory supervisors where the exercise of that authority is "routine," i.e., does not require the use of "independent judgment." As to what constitutes "independent judgment" under Section 2(11), there is a distinction between that concept and the "judgment" exercised by a "professional employee" as defined by Section 2(12). Thus, the exercise by a "professional employee," such as a skilled health care worker, of "discretion and judgment" as defined in Section 2(12) does not mean that he or she necessarily exercises "independent judgment" in the Section 2(11) sense.

These cases are currently pending before the Board.

EMPLOYER REFUSAL TO BARGAIN

Successor Obligation to Bargain Before Setting Initial Terms of Employment

One case considered by us presented the question whether, in the circumstances, a successor employer was required to bargain with the incumbent union before setting initial terms of employment.

In early 1994 the Union, which represented the employees at a nursing home, was informed that the home was being sold and that the transfer of ownership would take place at a later date. On the afternoon of June 30, 1994, the union was advised that the transfer would become effective at 12:01 a.m., July 1, 1994. The Union, by letter, immediately requested the purchaser to recognize it as bargaining representative.

At about 7 p.m. on June 30, before transfer of the facility, the successor Employer appeared at the premises to inform the employees working the 3 p.m. to 11 p.m. shift of the change in ownership and of certain changes in terms of employment. The Employer informed the employees that they would have to reapply for employment and invited them to continue working pending approval of their applications. The Employer did not meet with the 11 p.m. to 7 a.m. shift until 6 a.m., and the 7 a.m. to 3 p.m. shift was told of the changes at about 10:30 a.m.

All the employees were retained by the Employer, who subsequently recognized the Union and entered an interim collective bargaining agreement with it. However, the Union filed the subject charge because, upon assuming operation of the home, the Employer had instituted changes in conditions of employment without first consulting with the Union.

Based on the above, we concluded that the Employer had violated Section 8(a)(1) and (5) of the Act by establishing new terms of employment without consulting with the Union.

Under the successorship principles established in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), an Employer is obligated to accept the collective bargaining relationship of the predecessor employer if a majority of its employees had been employed by the predecessor and if there is a "substantial continuity" of the employing enterprise. While the Court also held that a successor is ordinarily free to set initial terms on which it will hire the predecessor's employees without first bargaining with the employees' bargaining representative, the Court added the caveat:

> There will be instances in which it is perfectly clear that the new employer plans to retain all

> the employees in the unit and in which it will be appropriate to have him consult with the employees' bargaining representative before he fixes terms. (Id. at 294, 295)

In Spruce-Up Corp., 209 NLRB 194 (1974), the Board undertook to construe this "perfectly clear" exception to the successor's right to set initial terms. While conceding that the Court's meaning was not easy to discern, the Board majority concluded:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can be fairly said thatthe new employer "plans to retain all of the employees in the unit, "as that phrase was intended by the Supreme Court.(Id. at 195).

And concerned that the Court's language not be construed to work a forfeiture of the employer's rights, the Board added:

> We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without changes in their wages, hours, or conditions of employment, or at least to circumstances where the new employer. . . . . has failed to clearly announce its intention to establish a new set of conditions prior to inviting former employees to accept employment. Ibid.

Here, the successor's takeover and announcement of changes in terms and conditions of employment occurred within hours of each other. However, the Employer permitted the employees to work for several hours (in one case almost the entire shift) before making such announcements. Such failure to notify a majority of the employees that they were working for a new employer under different terms before they started working under such terms was not deemed to constitute an "announce[ment of] new terms prior to or simultaneous with ... [the] invitation to the previous work force" within the meaning of Spruce-Up. Accordingly, we concluded that the company was obligated to bargain with the Union before setting new terms of employment.

We further concluded that the circumstances of this case fell squarely within the "perfectly clear" exception as spelled out by the Court in Burns, and that insofar as Spruce-Up would privilege the Employer's unilateral setting

of initial terms of employment, that decision was too narrow a reading of the Court's caveat. Thus, it is clear that the nursing home had to be operated without interruption in service due to the nature of the care it provides. And the Employer acknowledged that, in most instances where it has taken over a nursing home, the vast majority of the predecessor's employees have been retained. (This may be the result of state regulations requiring continuity of care as well as the difficulty in hiring experienced workers.) While the Employer may have been able to make other arrangements if a majority of the employees had quit upon learning of the new terms, the reality was that the Employer expected the employees to continue and had taken no steps to provide an alternative work force in the event they did not. Thus, although the Employer never made such an announcement, it is clear that he fully intended to hire the predecessor's employees. Accordingly, we concluded that the obligation to bargain regarding new terms attached when the Employer formulated its plan to hire a majority of the predecessor's employees, rather than when a majority of such employees were in fact hired by the predecessor.

Alternatively, we decided to urge the Board to reconsider its position taken in Spruce-Up and adopt the view set forth in Board Member Fanning's dissenting opinion. In this respect, the Board majority was of the view that, where the successor announces new terms simultaneously with its offer of employment to the predecessor's employees, there was a real possibility, which any new employer realistically would anticipate, that the employees may not wish to work for the new employer on the basis of the new terms.

> Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts. Ibid.

In his dissent, Member Fanning observed:

> Surely, an employer who offers employment to all the employees of a predecessor "clearly plans to retain all of the employees in the unit . . . " The fact that some employees may refuse the offer of employment has nothing to do with the "plans or intent of the offering employer. It may be that he will have to alter his plans, if the employees refuse the offer of employment, but at the time of the offer, he assuredly plans to retain those employees. Where such is the case, and where the union representing those employees has made an appropriate bargaining demand, I agree with Member Penello that under Burns the successor is

obligated to consult with the union "before he fixes terms."

. . .

Nor can there be any economic injury to the successor in bargaining in good faith prior to the commencement of operations, for assuming good faith bargaining on his part, if the union cannot persuade him that other terms are more equitable, he is perfectly free to impose those terms and conditions of employment upon the commencement of operations.

The majority's contrary construction of this aspect of the Burns decision leads to the anomalous, it notabsurd, result that a bargaining obligation over the establishment of the successor's initial terms and conditions of employment arises when the successor plans to retain the former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear the "mediatory influence of negotiation" where there is no controversy but deny its appropriate use where there is controversy. Id. at 205-206, citations omitted.

We viewed member Fanning's dissent s the more compelling interpretation of the Court's "perfectly clear" caveat in Burns and decided to seek its adoption by the Board.

Duty To Supply Information Concerning Proposed Relocation of Unit Work

In one case, we considered whether an employer had satisfied its duty to provide the union with sufficient information concerning the proposed relocation of bargaining unit work.

The Employer operated several facilities nationwide where it engaged in the distribution of its own products as well as parts for other manufacturers under fee-for-service contracts. In November 1993 the Employer advised the Union of a proposal to relocate the distribution work of one of its clients from the subject plant ("Plant A") to another of its facilities ("Plant B"), located in another state, which would result in the loss of a number of unit jobs. The Employer maintained that the Plant A labor costs were out of line and that the client had informed the Employer that, in order to keep the work at Plant A, there had to be a thirty

per cent reduction in costs. The Employer advised that it had granted the customer the thirty percent reduction, but that it could not continue to perform the work at Plant A under the then-current wage rates. The Employer advised that it was prepared to bargain with the Union over the matter.

At a meeting in December 1993, the Union requested the Employer to supply the "line item costs" (receiving fee, plus storage fee, plus shipping fee) for parts shipped out of Plant A and Plant B. The Employer supplied the line item costs for Plant A but asserted that it did not have that information for Plant B. The Union also asked for a breakdown showing how much of the Plant A line item cost was labor costs. The Employer responded that it did not have such information. The Union asked for notes of the Employer's meetings with the client relative to the client's request for the rate reduction but the Employer responded that those items were confidential.

In February 1994, in further response to the Union's request for labor cost data, the Employer presented the Union an analysis setting forth projected revenues if the work were performed at Plant A compared to such revenues if the work were performed at Plant B and the projected labor costs as a percentage of total revenues at each location. The analysis indicated that labor costs as a percentage of total revenues was 44 percent for Plant A compared to 19 percent for Plant B. The total labor costs savings by moving the work from Plant A to Plant B would exceed $500,000 a year. The Union was not agreeable to the substantial wage reduction being proposed by the Employer in order to retain the work at Plant A, the negotiations broke off, and the Employer announced its intention to relocate the work to Plant B.

We concluded on the above facts that the Employer had provided the Union with sufficient information to permit it to engage in meaningful bargaining with respect to the proposed relocation of the work. Although the Employer had failed to provide a breakdown of labor costs per line item as requested, there was no evidence that the Employer possessed such information (see, Whittier Area Parents' Association for the Developmentally Handicapped, 296 NLRB 817, 831 (1989)) and the Union made no effort to determine whether such information could be obtained or offered to help pay costs related thereto. Nor was there any indication that the Union, possessed with information concerning line item costs, comparative overall labor costs and labor costs savings to be realized, could not engage in meaningful bargaining without knowing the amounts attributable to labor costs per line item. See, e.g., Cincinnati Steel Castings Co., 86 NLRB 592 (1949) and its progeny. Although the Employer did not immediately supply the labor cost data, such delay was not deemed unlawful or

indicative of bad faith where the Employer otherwise had provided substantial information in a timely fashion and there were differences between the parties concerning the availability of labor cost information and the format within which it should be supplied.

We accordingly concluded that issuance of complaint was not warranted in this case.

Automatic Renewal Clause In A Separate Agreement

In one case, we considered whether: (1) an automatic renewal or "evergreen" provision in a separate contract was incorporated by reference into the parties' collective-bargaining agreement; (2) if so, the evergreen clause precluded termination of the agreement pursuant to Section 8(d); and (3) the Employer violated Section 8(a)(5) by bargaining to impasse on its decision to subcontract unit work.

The Employer and the Union were parties to a memorandum of agreement, terminating on July 20, 1991. That agreement incorporated a multiemployer agreement with the exception of provisions addressing wages, holidays, and other terms and conditions of employment. The multiemployer agreement contained a provision entitled "Sale or Transfer of Building," that contained an evergreen clause. The evergreen clause provided that, after contract expiration, the contract's terms would continue during negotiations and any new agreement would be retroactive to the date of the old agreement. If the parties could not agree on a new contract, the Union could engage a work stoppage without causing a termination of the contract. The contract did not provide a mechanism for either party to give notice of intent to terminate or renegotiate any of the contractual terms. In 1991, the parties negotiated a renewal agreement effective until 1993.

More than 60 days before the 1993 expiration date, the Employer sent the Union a letter stating that it intended to terminate the agreement upon its expiration, and to subcontract the unit work for economic reasons. The Employer offered to bargain about the effects of its decision. During this bargaining, the Union agreed that it could not meet the cost savings which the Employer would experience by subcontracting. The parties eventually agreed that they were at impasse.

The Employer implemented its impasse proposal and subcontracted the unit work. The Union filed for arbitration, alleging that the subcontracting violated the contract. In response, the Employer filed a district court lawsuit seeking a declaratory judgment that no contract was in effect. The Union then filed a Section 8(a)(5) charge alleging that the Employer had unlawfully bargained to impasse on a permissive subject, i.e., that the contract had automatically renewed under the evergreen clause, and the Union therefore was not compelled to agree to any changes the Employer proposed.

We decided that there was no merit to the Union's allegation that the contract had automatically renewed. We noted that the evergreen clause, which the parties had not themselves negotiated, was not incorporated into the parties' memorandum of agreement. Moreover, the parties' agreement itself had an unambiguous expiration date that had been the subject of bargaining. See generally, Restatement 2d, Contracts, Sec. 203(d) (1979). Thus, the Employer gave a notice to terminate that was contractually timely and then bargained in good faith to impasse with the Union about subcontracting.

We also decided that the Employer's actions were lawful under an alternative theory. Even if the evergreen provision had been incorporated into the parties' memorandum of agreement, that clause could not override the explicit termination date in the parties' contract. Therefore, the Union could not argue that the Employer knowingly waived its statutory right to terminate the contract within the Section 8(d) period. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), as to standards for finding waivers of statutory rights. Moreover, the common law presumption against agreements in perpetuity is applicable to labor contracts. Federal Cartridge Corp., 172 NLRB 121 (1968). Under this principle, contracts with no specific duration are considered terminable at will, upon reasonable notice. Section 8(d) provides a reasonable notice period of 60 days for contract termination. NLRB v. Lion Oil Company, 352 U.S. 282, 292-93 fn. 13 (1957).

UNION RESTRAINT OR COERCION

Union Discipline of Dissident Member Seeking To Amend Union Bylaws

Another interesting case considered whether the Union violated Section 8(b)(1)(A) when it disciplined a dissident member for making a factually incorrect accusation against

another Union member while the dissident member was attempting to justify proposed amendments to the Union's bylaws.

The dissident member had unsuccessfully run for Union President in 1991 against incumbent President A. The dissident was planning another run for that office in December 1994. In March 1993, the dissident was approached by another member about changing the Union's bylaws which did not allow members to vote on contracts. In April 1993, the dissident proposed three Union bylaws amendments concerning membership rights to vote on contracts, union finances and strikes. The Union's Executive Board had decided to reject the proposed bylaw amendments.

The dissident and the other member drafted a letter dated May 11, 1993 (the May letter) which discussed their proposed bylaw amendments. The May letter was distributed to all current Union officers and members of the Union's Executive Board. In the May letter, the dissident cited a past example of the Union's having agreed to something that employee-members had not been aware of nor voted upon:

> [Dissident] is aware of a similar situation concerning the bindery...where the attached side-letter agreement (marked "B") was signed by [past Union president B]...Again, members did not vote on it and were not even aware that it had been signed until it leaked from someone in management several months later.

Past president B had opposed the dissident and supported incumbent president A in the 1991 election. A copy of the side-letter, dated June 20, 1988 but not actually signed by past president B, was attached to the May letter.

In August 1993, B filed Union charges against the dissident accusing her of lying and misrepresenting facts about him. In February 1994, a Union trial board was convened to hear these charges. The trial board decided that the dissident was guilty because B had not signed any side-letter of agreement with management without the authorization or approval of the membership. Attached to the trial board decision was an exhibit in the form of a letter, dated June 17, 1988 and actually signed by B. The exhibit letter was substantially similar to but not identical to the June 20 1988 side-letter attached to the dissident's May letter.

The dissident had been given a copy of the June 20, 1988 side-letter by a member of the Union's negotiating committee for the involved employer. According to that member, employees had not voted on the two issues in the side-letter agreement, and B had signed a copy of that

letter. The Region has been unable to determine whether the dissident's May 11 letter accusation, viz., that members had not voted on the contents of B's June 1988 side-letter agreement, was true or false.

We decided that further proceedings were warranted in order to place before the Board the issue of whether the Union's internal discipline violated Section 8(b)(1)(A).

Although a union has great latitude in promulgating and enforcing internal union rules, the use of intraunion discipline to prevent employees from engaging in intraunion political activities violates Section 8(b)(1)(A). In Scofield v. NLRB, 394 U.S. 423 (1969), the Supreme Court held that a union did not violate Section 8(b)(1)(A) by fining and threatening to expel employees who did not adhere to union-determined production quotas. The Court stated that a union is "free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." The Court contrasted that union rule with the rule found unlawful in NLRB v. Marine Workers, 391 U.S. 418 (1968), because the latter rule required members to exhaust internal union remedies prior to filing Board charges, and thus interfered with access to the Board.

Thereafter, in Carpenters Local Union No. 22 (Graziano Construction), 195 NLRB 1 (1972), the Board relied on Scofield and Marine Workers to find that the union violated Section 8(b)(1)(A) by fining a member because of the manner in which he participated in internal union affairs. The Board said that, in determining the legality of a union fine, it is charged with considering the full panoply of Congressional labor policies, specifically the rights guaranteed employees by the LMRDA to participate fully and freely in the internal affairs of their own union.

In 1976, in Operating Engineers Local 400 (Hilde Construction), 225 NLRB 596, enfd. 95 LRRM 3010 (D.C. Cir. 1977), members who were dissatisfied with a union strike vote called other members and also publicized a meeting at which they attempted to discuss the strike. The union fined these members for "disruption... creat[ing] dissension among the members... destroy[ing] the interest and harmony of the Local Union." The Board, Chairman Murphy dissenting, affirmed the ALJ's conclusion that the fines violated Section 8(b)(1)(A) on the grounds that the employees were engaged in the protected activity of questioning the wisdom of their bargaining representative and attempting to engender support to persuade the union to change its bargaining strategy. The ALJ, in so finding, rejected a claim that the LMRDA preempted the Board in this matter.

The ALJ relied on LMRDA, 29 U.S.C. Sec. 523(b) which recites, inter alia, that "Nothing contained in this chapter... shall be construed to... impair or otherwise affect the rights of any person under the National Labor Relations Act..." 225 NLRB at 606.

In Teamsters Local 287 (Airborne Express), 307 NLRB 980 (1992), the Board held that the mere maintenance of a provision requiring the payment of fines before dues violated 8(b)(1)(A). Citing Hilde Construction, the Board relied on 29 U.S.C. Sec. 523(b) to reject a union contention that the maintenance of the provision was preempted by the LMRDA. The Board has also found that a union violates Section 8(b)(1)(A) when it terminates an employee's membership in retaliation for the employee's internal union activities, specifically including campaigning for union office. ,See Machinists District 91 (Pratt & Whitney), 278 NLRB 39 (1986), enfd. per curiam 817 F. 2d 235, 125 LRRM 2335 (2d Cir. 1987), and Teamsters Local 287 (Emery Air Freight/Airborne Express), 304 NLRB 119 (1991).

Finally, in Teamsters Local 579 (Janesville Auto Transport Co.), 310 NLRB 975 (1993), union officer Kaiser arranged special health care discounts for union members. Eight members, including charging party Watson and also Wilson, who was Kaiser's political rival in a pending election, signed a letter objecting to Kaiser's arrangement. Kaiser responded by (1) attacking Watson as "anti-union"; (2) publishing Watson's letter to demean Watson's and Wilson's union politics; and (3) announcing at a union meeting that the eight letter signatories would be denied extra union benefits. Citing Scofield and Graziano, the Board found a Section 8(b)(1)(A) violation because the union's denial of benefits impaired policies imbedded in the labor laws, viz. "the right guaranteed by the Labor-Management Reporting and Disclosure Act of 1959 to participate fully and freely in internal union affairs...also...the right guaranteed by Section 7 of the Act to concertedly oppose the decisions made by the incumbent leadership of the Union." Id.

We decided that the Union in our case violated Section 8(b)(1)(A) for essentially the same reasons expressed in Janesville. The dissident together with the other member was attempting to change the bylaws of her Union. She was being opposed by her political rivals from a prior Union election and potential rivals for an imminent Union election. The distinction between this case and Janesville, et al., is that here, the dissident's political rivals seized upon an apparent factual error in her May letter to attempt to censure her and impose a fine. Even assuming that the Union trial board's findings were correct, and that the May letter was factually incorrect, the Union's retribution nevertheless "offended policies imbedded in the

labor laws" because any factual error did not remove the dissident's conduct from the protection of either the LMRDA or the NLRA.

Regarding the LMRDA, in Machinists, Fulton Lodge No. 2 v. Nix, 415 F.2d 212, 71 LRRM 3124, 3128 (5th Cir 1969), a union member was expelled for circulating false and/or malicious statements attacking the character and integrity of a political rival. The court found a violation of the LMRDA Bill of Rights' protection of free speech: "a union may not subject to retributive disciplinary action a member accused of libeling or slandering a union officer." See also Boilermakers v. Rafferty, 348 F.2d 37 (9th Cir 1965), involving the unlawful expulsion of members proposing bylaw revisions, where the circuit court agreed with the district court below: "Assuming the statements of the plaintiff in the circular were false, as found by the Union, their dissemination to Union members would not justify expulsion as a matter of law..."

Regarding the NLRA, in Texaco, Inc. v. NLRB, 462 F.2d 812 (3d Cir 1972), the court upheld a Board ruling to the effect that misstatements made in the course of union activity do not lose the protection of the Act unless they are "deliberately or maliciously false." See also Jacobs Transfer, Inc., 201 NLRB 210, 218 (1973) where the Board adopted an ALJD stating:

> A union member seeking to exercise his right to criticize the union administration and to supplant it does not speak at his peril. He is permitted reasonable latitude, even for error, though that error may be hurtful to others, if his utterances are in good faith, on colorable ground, and not deliberately or maliciously false.

In this case, the dissident had made the assertions in the May letter for the purpose of criticizing and remedying what she and another member considered to be serious flaws in their Union. The assertions were made in good faith and were not deliberately or maliciously false. The Union retributive conduct therefore violated Section 8(b)(1)(A).

Denial of Accrued Seniority To Employees Returning From Supervisory Positions

One case arising during this period considered whether the Union violated Section 8(b)(1)(A) when it denied accrued seniority and benefits to two employees who left the unit and then later returned to the unit.

In early 1992, Employee A was promoted to Superintendent, a position established by the collective-

bargaining agreement to be outside the bargaining unit. Employee A requested and received an honorary withdrawal card from the Union.

Around one year later, Employee A was demoted to salaried foreman, a "working foreman" unit position. He requested reissuance of his Union card, with accrued unit seniority restored. The Union reissued Employee A's card, but informed him that he had given up his accrued seniority when he left the unit.

The Employer filed a contractual grievance over Employee A's loss of seniority. In defending against this grievance, the Union relied upon a section of the bargaining-agreement which stated in pertinent part that "as of the date of signing of this Agreement, any journeyman holding the position of superintendent or general foreman who desires to remain in the bargaining unit may do so with priority unimpaired by resigning the position of general foreman or superintendent." The Union claimed that this language meant that superintendents who did not resign by "the date of signing of this Agreement" lost all accumulated seniority. The Employer claimed this language meant that, from the date of the Agreement forward, superintendents who returned to the unit would regain the seniority they had accrued when previously in the unit.

In late 1992, Employee B was promoted to the position of Assistant Superintendent, a non-unit position created by the Employer after the execution of the collective-bargaining agreement. Employee B requested an honorary withdrawal card. The Union stated that the new Assistant Superintendent position should be in the bargaining unit, and that it would decide whether to issue a withdrawal card after the unit status of this position was determined. In January 1993, the Union informed Employee B that he was two months delinquent in his dues and faced suspension. Employee B paid the two months dues.

In early 1994, Employee B was demoted to salaried foreman and asked the Union to reissue his membership card with accrued seniority restored. The Union stated that his former Assistant Superintendent position had been part of the unit, and that dues were owing from the months served in that capacity. Employee B's repeated efforts to determine the amount of dues owing were unsuccessful.

At a labor-management meeting in May 1994, the Union stated that it was going to seek Employee B's discharge for non-payment of dues. Shortly thereafter, Employee B was informed that he owed dues for the entire period since his return to the unit. He paid the dues owing and was returned to membership in good standing. However, the Union informed

the Employer that it had stripped Employee B of his accrued seniority.

Several Employer representatives stated that, at a meeting in July 1994, the Union president admitted to the Employer that both Employees A and B had lost their seniority because they had not paid dues while working as superintendent and assistant superintendent.

We decided that the Union violated Section 8(b)(1)(A) by stripping the accrued seniority from Employees A and B.

In Manitowoc Engineering Co., 291 NLRB 915 (1988), enfd. 909 F.2d 963 (7th Cir. 1990), the Board considered a contract provision that conditioned retention of accrued seniority rights on fulfilling a union obligation during a period of non-unit employment, viz., paying dues or obtaining a discretionary withdrawal card under union rules. The Board found that this provision unlawfully discriminated against employees returning to the unit:

> The provision consequently treats employees returning to the unit in a different way with respect to seniority, giving some employees valuable seniority credits and withholding the credits from others. In making the grant or denial of such an advantageous employment condition depend on an employee's fulfilling a union obligation, the provision clearly and inherently encourages individuals to participate in a union activity - the payment of union dues while they are not being represented by the union - that they otherwise would not be inclined, let alone required, to engage in.

In Tampa Printing and Graphic Communications Union No. 180, 238 NLRB 24 (1978), the Board held that the union violated Section 8(b)(1)(A) by denying a demoted supervisor his accrued journeyman priority because he had resigned his union membership when he became a supervisor. The collective-bargaining agreement provided that unit priority would depend upon "continuous employment in a nonsupervisory classification covered by the agreement" (emphasis added), and therefore the employee had no contractual right to priority when he returned to the unit. However, the Board found that the union had demonstrated a willingness to modify the provision, and that the employee's lack of union membership was a "salient consideration" in the actual disposition of his priority claim. The Board relied upon statements by union representatives to the effect that the employee's claim might be treated differently had he remained a union member during his supervisory tenure.

In our case, we decided that the Union stripped the accrued seniority from Employees A and B because they had

not paid dues while working outside the bargaining unit. In particular, the Union's admission to the Employer in July regarding the stripping of the employees' seniority demonstrated that these employees would have retained their accrued seniority, irrespective of any contractual provision, if they had continued to pay dues while working outside the unit. See Tampa Printing, 238 NLRB at 24. In our view, it would not have been unlawful for the Union to have interpreted the contract to eliminate accrued seniority for all employees returning to the unit from supervisory positions. However, it was unlawful under Section 8(b)(1)(A) for the Union to condition retention of such seniority on the payment of dues while working outside the unit.

PROCEDURE IN UNFAIR LABOR PRACTICE CASES

Deferral To Grievance-Arbitration Procedure In Face of Threats Against Grievance Filing

Another interesting case involved whether it would be appropriate to defer a dispute to the parties' collective-bargaining agreement's grievance-arbitration procedure, under Collyer Insulated Wire, 192 NLRB 837 (1971), where the Employer allegedly threatened employees for using that contractual grievance procedure.

The Union represented the letter carriers at a post office which consisted of three separate facilities. The stewards at one of these facilities had been very active in enforcing the contract over the past few years. This had angered the postmaster who had complained to the Union about the grievance levels at that location. On one day, this station manager convened meetings with small groups of all letter carriers working that day, an apparently unusual occurrence. That particular day was a scheduled day off for the two facility stewards. When another Union officer reported for work that day, he was not permitted to attend the meetings.

During these meetings, the manager told the unit employees that in light of the large number grievances filed at that facility in the last year, compared with far fewer grievances filed at the two other facilities, this facility was unable to meet its budget goals. the manager stated that he did not have sufficient flexibility to move carriers around because the stewards filed grievances enforcing contractual provisions covering the movement of employees. The manager warned that unless the employees stopped the grievance filing, or convinced the stewards to stop, he would not be able to grant certain time off that had been the subject of other grievances, and he would be less

flexible in enforcing rules and would start disciplining the carriers for violating the rules.

The Region concluded that if Collyer deferral were not appropriate, then complaint should issue alleging that the Employer unlawfully threatened unit employees and bypassed the Union at these meetings. We decided that the allegations should not be deferred.

In Joseph T. Ryerson & Sons, Inc., 199 NLRB 461, 462 (1972), the Board refused to defer a charge alleging that the employer's general manager threatened a union officer during grievance processing by telling the union officer that he would "have a hard time with the company and also the men in the warehouse" if he pursued the grievance. The Board reasoned, inter alia, that

> the violation with which this Respondent is charged, if committed, strikes at the foundation of that grievance and arbitration mechanism upon which we have relied in the formulation of our Collyer doctrine...we must assure ourselves that those alternative procedures are not only "fair and regular," but that they are or were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures.

However, in United Aircraft Corporation, 204 NLRB 879, 881 (1972), enfd. sub nom. Lodges 700, 743, 1746 Machinists v. NLRB, 525 F.2d 237 (2d Cir. 1975), the Board (Fanning and Jenkins dissenting) deferred charges that the employer, inter alia, harassed employees acting as stewards because of their union activities. The Board reasoned that the alleged acts of harassment and coercion had occurred at only three of the employer's nine facilities where over 40,000 individuals were employed and involved only 13 out of 1,645 first-level supervisors and several plant security employees. The Board noted, however, that it would not have deferred had the employer engaged in serious past unlawful conduct, or if the "evidence also should indicate that the parties' own machinery is either untested or not functioning fairly or smoothly."

Thereafter, the Board in United Technologies, 268 NLRB 557, 560 (1984), expanded its deferral policy to arguably meritorious Section 8(a)(1) charges, in circumstances where the dispute is cognizable under the parties' grievance and arbitration procedure; there is no conduct alleged that would constitute a rejection of the principles of collective bargaining; and the charged party is willing to arbitrate. Applying these principles, the Board distinguished Ryerson

and deferred a threat of alleged retaliation against an employee if she chose to pursue a grievance. The Board relied on United Aircraft Corp. for the proposition that the alleged misconduct "does not appear to be of such character as to render the use of that machinery unpromising or futile." The Board noted that the alleged threat was clearly cognizable under the broad grievance-arbitration provision of the parties' collective-bargaining agreement, and was made by a single foreman to a single employee and a shop steward during the course of a routine first-step grievance meeting concerning possible adverse consequences that would have flowed from a decision by the employee to process her grievance to the next step.

Subsequent to United Technologies, the Board in United States Postal Service, 290 NLRB 120 (1988), held that deferral was inappropriate where the Postmaster refused to reassign and promote an employee and threatened to harass, retaliate against, and prevent the employee's advancement because he had filed grievances and EEO complaints. The Board noted that the grievances and EEO complaints consistently were resolved in the employee's favor; the grievance-arbitration procedure had been totally ineffective in curbing the employer's proclivity to retaliate against the employee for filing grievances; and that this pattern of hostile conduct was fundamentally at odds with the Act and the policy behind deferral.

Based on the above, the Board has limited the application of Ryerson to those situations where it can be shown that the employer has interfered with the grievance/arbitration provisions of the contract in a way that has rendered access to it futile or unpromising. It must be demonstrated that the Employer's actions are a genuine obstacle to utilization of the grievance/arbitration procedure. See, e.g., United States Postal Service, 270 NLRB 114, 115 (1984)(deferral of threats to several employees for grievance filing where both parties agreed to submit the dispute to arbitration); United States Postal Service, 271 NLRB 1297 (1984) (deferral of change in the size, location, and arrangement of stewards' work area where parties processed grievance). Cf. North Shore Publishing Co., 206 NLRB 42, 43 (1973) (no deferral where employee was discharged for invoking grievance procedure after being threatened by foreman that reprisals would ensue if grievance not withdrawn); Dallas & Mavis Forwarding Co., 291 NLRB 980, 985-986 (1988) (no deferral, in part, where employer arguably retaliated against employees because they sought their union's assistance in obtaining information regarding the enforcement of contract rates).

In our case, the Employer's highest-ranking official at the facility threatened nearly the entire unit with reprisals if they, through the Union, continued to enforce

the contract by filing more than a minimal number of grievances. The Employer's rationale was not that the grievance-filing was frivolous, but that it could not reach its "budget goals." Unlike United Technologies and United Aircraft, these threats were not isolated incidents of 8(a)(1) statements by a renegade supervisor. Rather, as in Postal Service, supra, 290 NLRB 120, the Employer's threats for grievance filing activity were a genuine obstacle to utilization and integrity of the grievance procedure, and were fundamentally at odds with the Act and the policy behind deferral. We therefore decided that deferral here was unwarranted because the Employer's conduct essentially constitutes an abrogation of the grievance-arbitration procedure.

REMEDIES

Successor Obligation to Remedy Unlawful Lockout of Predecessor

One case we considered concerned a successor employer's obligation to remedy the unfair labor practice violations of its predecessor.

The Union had been the certified bargaining representative of a company's production employees for many years. In 1988, however, the company began obtaining its production employees through labor leasing arrangements with the predecessor employer, which assumed the company's collective bargaining agreement with the Union. Thereafter, during contract renewal negotiations, the predecessor locked out the unit employees and replaced them with new hires when the Union refused to accede to its demands. In subsequent unfair labor practice proceedings the Board found the lockout unlawful and ordered, inter alia, reinstatement and backpay.

During the pendency of the unfair labor practice proceedings, the predecessor had gone out of business and been replaced as labor contractor by the instant Employer. During their negotiations, the manufacturer informed the Employer of the pending unfair labor practices. The Employer hired most of the employees who had replaced the locked out employees and recognized the Union as their bargaining representative, thus becoming a legal successor under the Act. However, the Employer refused to reinstate the locked out employees or to bargain with the Union concerning their reinstatement.

On the above facts, we concluded that the Employer was obligated to bargain with the Union concerning reinstatement of the locked out employees. Under Section 2(3) of the Act, the term "employee" includes "any individual whose work has

ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . ." The status of unlawfully locked out employees thus was deemed analogous to that of unfair labor practice strikers who, under Section 2(3), remain employees within the bargaining unit. Inasmuch as Section 8(d) of the Act requires an employer to bargain concerning terms and conditions of employment of employees within the bargaining unit, the reinstatement of the employees unlawfully locked out herein was deemed to constitute a mandatory subject for bargaining; consequently, the Employer's rejection of this bargaining obligation violated Section 8(a)(5) of the Act. See, e.g., Fabsteel Company of Louisiana, 231 NLRB 372 (1977), enfd. 587 F. 2d 689 (5th Cir. 1979), where the predecessor's unfair labor practice strikers were included in the unit for purposes of determining whether the union represented a majority of the successor's work force. See also, Garney Morris, Inc., 313 NLRB 101, 117 (1993), and Air Express International, 245 NLRB 478, 501 (1979).

We also concluded that the Employer was a Golden State successor jointly obligated with the predecessor to remedy the latter's unfair labor practices. In Golden State Bottling Co. v. NLRB, 414 US 168 (1973), the Supreme Court upheld the Board's extension of a reinstatement and backpay remedy to a purchaser that had acquired the business with knowledge of the unremedied unfair labor practices. Subsequently, in Glebe Electric, Inc., 307 NLRB 883 (1992), the board refused to extend Golden State liability to an employer that, like the successor Employer herein, had no business relationship with the business entity that had committed the unfair labor practices. Notwithstanding Glebe, however, we concluded that the Employer herein was a Golden State successor within the contemplation of the Court's decision.

In the Glebe case, Glebe was a subcontractor which had gone bankrupt after committing unlawful discharges but before completing the final phase of a subcontract. Aneco, another subcontractor, contacted the general contractor and agreed to complete the work under the same terms Glebe had enjoyed. Aneco was told of the pending unfair labor practices. Aneco offered jobs to all of Glebe's employees, but the alleged discriminatees did not apply for jobs. Relying primarily on the "total absence of any business relationship between Glebe and Aneco," the Board refused to find that Aneco was a Golden State successor liable to remedy Glebe's unlawful discharges. Also pertinent to the Board's decision was its finding that Aneco had not benefitted from Glebe's illegal conduct. The Board noted that Aneco had acquired the contract, not in consequence of the unfair labor practices, but solely as a result of Glebe's going out of business. The Board also noted that any benefit flowing from the unlawful discharges was

marginal at best, since Aneco had offered work on the job to all Glebe employees, such jobs were of relatively short duration, and the number of such jobs was of minimal significance in the context of Aneco's total work force of over 300 employees. As a final consideration, the Board concluded that imposition of Golden State liability on a construction industry contractor "merely because it replaced the offending subcontractor on a construction project . . . would unfairly encumber the general contractor's ability to obtain a subcontractor to complete the overall project." Golden State, supra, at 889.

We concluded that the instant case was distinguishable from Glebe. Unlike the successor Aneco in Glebe, the successor-Employer herein had benefitted from the predecessor' unfair labor practices. Thus, unlike the short-term jobs involved there, the jobs here were of permanent duration. And unlike successor Aneco, the Employer herein refused to offer jobs to any of the locked out employees, or even to bargain concerning their prospects for reinstatement or rehire. Further, the jobs at issue herein encompassed the entire bargaining unit, compared to the small fraction of overall job positions at issue in Glebe. Thus, since the Employer here took on a work force from which all Union members, including employee Union leaders, had been excluded, leaving the Union without any employee leadership in the plant, the Employer was deemed to have benefitted, in its dealing with the Union, from the unlawful lockout of the employees. Cf. Golden State, supra, at 184.

We also were of the view that the Board's rationale in Glebe was not wholly consistent with the Court's decision in Golden State or the Board's decision in Am-Del-Co., Inc., 234 NLRB 1040 (1978), and other cases where there was no business connection between the successor and the predecessor. Thus, issuance of complaint herein would provide the Board an opportunity to reexamine the rationale in Glebe. In this respect, while in Glebe the Board undertook to distinguish Am-Del-Co on grounds that the successor had been responsible for initiating the "congery of events," which ultimately gave rise to the case, the dissenting opinion therein noted that "the majority here seeks to apply a post hoc rationale for Am-Del-Co . . . the majority has read into Am-Del-Co a rationale that does not withstand scrutiny. Furthermore, that rationale is without precedent or statutory support." Glebe, supra, at 890. Like the dissenting opinion, we viewed the majority's attempt to distinguish Am-Del-Co and other cases with which Glebe appeared to conflict as not totally convincing. different result.

Finally, it did not appear that the Glebe decision gave sufficient consideration to the policy reasons enunciated by

the Court in Golden State for imposing liability on a successor. The Court indicated that the failure to remedy the predecessor's unfair labor practices could lead to labor unrest, result in a leadership vacuum in the bargaining unit and indicate to employees that the successor had benefitted from the unfair labor practices. On the other hand, imposition of such liability would have the effect of the avoidance of labor strife, prevention of a deterrent effect of the exercise of Section 7 rights, and the protection of victimized employees. Golden State, supra, at 184-185.

All he above considerations were present in the instant case. The fact that negotiations bogged down due to the Employer's refusal to offer reinstatement to the unlawfully locked out employees could conceivably lead to labor unrest, demonstrate to employees the Union's weakened condition, have a deterrent effect on Section 7 rights, and leave the entire locked out work force without an effective remedy, particularly in light of the predecessor's apparent evaporation as an entity.

In the circumstances therefore, we authorized a Section 8(a)(5) complaint alleging that the Employer had unlawfully refused to bargain with the Union concerning reinstatement of the locked out employees. We further decided that the compliance proceedings in the prior case should be conslidated with the instant matter and the Employer charged as a Golden State successor for purposes of providing a full remedy for the predecessor's unfair labor practices.

Backpay for Paid Union Organizers Engaged in "Salting" Campaign

In another case, we considered what would be the appropriate remedy for the unlawful failure to hire a paid Union organizer, called a "salting" agent.

The Union operated a hiring hall for electricians in Florida, and was engaged in a "salting" campaign to organize non-union electrical contractors like the Employer. In a salting campaign, a union attempts to organize the employees of an employer by having the employer hire a union organizer as one of its own employees. As part of the Union's salting campaign in our case, a Union official applied for work with the Employer as a journeyman electrician.

On July 12, 1993, the Employer failed to hire him after he notified an Employer representative during an employment interview that he was an employee of the Union. A complaint issued alleging that the Employer unlawfully failed to hire this official, as well as seven other named discriminatees, because of their support for the Union. Our case involved

whether this official should receive backpay for the entire period subsequent to the unlawful refusal to hire.

In 1992 or 1993, when the official began applying to nonunion contractors for employment, a Union business manager told him that he would retain his Union position, salary and benefits during any period of employment with a contractor. The official was expected to perform his Union business in the evenings and on weekends. At two Union-sponsored organizing seminars in or around 1992, Union representatives urged local officials to engage in salting campaigns, using full-time organizers like the Union official in our case, and to keep Union agents on the locals' payrolls during any period when they were employed by a contractor.

No Union agent had ever been hired by a contractor during a salting campaign. The official in our case was never told how long he would remain working for a contractor as a salting agent. Thus, there was no evidence as to how long a local Union salting agent would work for a contractor while receiving Union pay.

Since the date of the discriminatory refusal to hire the Union official salting agent in our case, he applied only at non-union firms. The official made weekly visits to Florida Job Service to review job listings, and also completed job card referrals for posted openings with various contractors on seven occasions between July 12, 1993, and August 30, 1994. He also completed employment applications directly with contractors on at least eight occasions between July 28, 1993, and February 22, 1994. The Union official had not been hired by a contractor since the date of the unlawful refusal to hire.

We decided that the Union official was entitled to full backpay from the date that the Employer unlawfully refused to hire him to the present, subject to traditional factors regarding the tolling of backpay.

The Board has consistently held that paid union organizers seeking employment with nonunion firms are "employees" under Section 2(3) of the Act. See, e.g., Sunland Construction Co., 309 NLRB 1224 (1992); Oak Apparel, Inc., 218 NLRB 701 (1975); Sears, Roebuck & Co., 170 NLRB 533 (1968). This group includes both employees of the union, such as business agents, as well as mere union members who are given a stipend to "salt." Where discrimination is found, the Board issues a traditional make whole remedy, including backpay and reinstatement. See, e.g., Escada (USA), Inc., 304 NLRB 845 n.4 (1991), enfd. 970 F.2d 898 (3d Cir. 1992).

It is well-established that earnings from a secondary job which a discriminatee held prior to the unlawful discrimination and continued afterwards (i.e., a "moonlighting" job) are not offset against gross backpay. Plumbers Local 305 (Stone & Webster), 297 NLRB 57, 61 (1989); American Pacific Concrete Pipe Co., 290 NLRB 623, 627 (1988); Link-Belt Co., 12 NLRB 854, 872 (1939), mod. on other grounds 110 F.2d 506 (7th Cir. 1940), enfd. 311 U.S. 584 (1941). It is immaterial whether the secondary job is full-time or part-time. Rather, "the Board's emphasis seems clearly focused upon the secondary nature of the employment 'held outside full working hours' rather than the duration of that employment." Henry Colder Co., 186 NLRB 1088, 1090 (1970). However, should a discriminatee increase the number of hours worked at a secondary job after the unlawful discrimination, the wages earned from the increased hours are deductible as interim earnings. Kansas Refined Helium Co., 252 NLRB 1156, 1160 (1980), enfd. sub nom. Angle v. NLRB, 683 F.2d 1296 (10th Cir. 1982); Golay & Co., 184 NLRB 241, 245 (1970), enfd. 447 F.2d 290 (7th Cir. 1971), cert. den. 404 U.S. 1058 (1972).

We decided that a union organizer's earnings from the union, which remain constant both before and after the discrimination, are indistinguishable from other discriminatees' wages from secondary jobs. Thus, where a discriminatee was employed by a union prior to the salting campaign, and his union remuneration remained constant throughout the campaign, that union remuneration should not offset gross backpay. This is true whether the discrimination was a discharge or refusal to hire.

We further decided that a union agent/discriminatee engages in a reasonable search for interim employment even though the agent only applies for work at nonunion companies.

A discriminatee must make reasonable efforts to seek and hold "substantially similar employment" subsequent to the unlawful discrimination. Mastro Plastics Corp., 136 NLRB 1342, 1349 (1962), enfd. as modified 354 F.2d 170 (2nd Cir. 1965), cert. den. 384 U.S. 972 (1966). The discriminatee must merely engage in an "honest good faith effort" to find work; he or she is held only to a "reasonable assertion in this regard, not the highest standard of diligence." Aircraft and Helicopter Leasing and Sales, Inc., 227 NLRB 644, 646 (1976), enfd. 570 F.2d 351 (9th Cir. 1978), quoting NLRB v. Arduini Manufacturing Co., 394 F.2d 420, 422-23 (1st Cir. 1968). Thus, a discriminatee satisfies the duty to mitigate by applying at some, but not all, appropriate employers in the area. Florida Tile Co., 310 NLRB 609, 613 (1993), enfd. 19 F.3d 36 (11th Cir. 1994); Great Plains Beef Co., 255 NLRB 1410 (1981); Nickey Chevrolet Sales, Inc., 195 NLRB 395, 398 (1972) (employee

need not "exhaust all possibilities in seeking interim employment"). The Board looks to the record as a whole in determining the reasonableness of the discriminatee's job search. Laredo Packing Co., 271 NLRB 553, 556 (1984). Factors include the discriminatee's specific attributes, such as his or her skills, qualifications, age, as well as labor conditions in the area. Id.; Mastro Plastic Corp., 136 NLRB at 1359.

A respondent may reduce its backpay liability by establishing that the discriminatee "willfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment." Aircraft and Helicopter Leasing and Sales, 227 NLRB at 646, quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 199-200 (1941). The respondent has the burden to affirmatively establish that the discriminatee "neglected to make reasonable efforts to find interim work." Future Ambulette, Inc., 307 NLRB 769, 770 (1992), quoting NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575-76 (5th Cir. 1966). Evidence of lack of success is insufficient and any uncertainty on this issue must be resolved against the respondent as the wrongdoer. Aircraft and Helicopter Leasing, 227 NLRB at 646.

The Board has looked beyond the terms and conditions of an interim job in considering whether it amounted to "substantially similar employment." In a variety of cases, the Board has held that interim employment which would degrade the discriminatee's lifestyle is not "substantially similar" to his or her prior position, and thus may be declined without penalty. For instance, a discriminatee was held not obligated to search for or accept work which (1) required work on day shifts where the discriminatee previously worked nights: Richard Kaase Co., 162 NLRB 1320, 1331-32 (1967) (employee not required to "change her mode of living" where she was the primary care provider for her grandchild during the day). See also American Pacific Concrete Pipe, supra, 290 NLRB at 625-27; Teamsters Local 164, 274 NLRB 909, 913 (1985) (discriminatee "not required to search for work substantially different from her job with [the Respondent] where she worked days"); (2) required the discriminatee to give up active duty service in the Air Force Reserve, American Pacific Concrete Pipe, 290 NLRB at 627; (3) required substantial separation from family, Terpening Trucking Co., 283 NLRB 444, 446 (1987) (on road five days per week); Sioux Falls Stock Yards Company, 236 NLRB 543, 563 (1978) (Loewen); (4) required substantial travel from home: The Westin Hotel, 267 NLRB 244, 248 (1983), enfd. 758 F.2d 1126 (6th Cir. 1985) (job 100 miles from home); F.M. Broadcasting Corp., 233 NLRB 326, 328-29 (1977) (70 mile round trip); or (5) required the discriminatee to move away from his lifetime residence: Florence Printing Co., 158 NLRB 775, 792 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), cert. den. 389 U.S. 840 (1967).

See also Teamsters Local 439 (Los Angeles-Seattle Motor Express, Inc.), 194 NLRB 446, 450 (1971); Oman Construction Co., 144 NLRB 1534 (1963), enfd. 338 F.2d 125 (6th Cir. 1964), cert. den. 381 U.S. 925 (1965).

Furthermore, the Board has not required a discriminatee to violate his or her union convictions under the guise of mitigation. Thus, a discriminatee is not required to accept employment behind a picket line at an interim employer's facility, since "the duty to mitigate has never been held to encompass a duty to engage in strikebreaking." Big Three Industrial Gas & Equipment Co., 263 NLRB 1189, 1206 (1982) (Fowler). See also John S. Barnes Corp., 205 NLRB 585, 588 (1973) (Brown; no willful loss where discriminatee refused offer of five or six days' work at plant where employees out on strike).

We recognized that in some industries or particular locations, a search for work at only nonunion companies may constitute an extremely limited search. However, in general we decided that a union salting agent/discriminatee who searches for interim employment only at nonunion firms satisfies his or her duty to mitigate.

First, requiring union agents to mitigate damages by seeking interim employment with unionized companies would necessarily require the agent to jeopardize or relinquish his or her secondary employment with the union. A secondary job is a lifestyle choice similar to the lifestyle choices found privileged in the above cases, i.e., night shifts, Air Force Reserve service, commuting distances, etc. Thus, requiring a discriminatee to violate his or her responsibilities to a second employer during the interim period, the very time when the employee otherwise is out of work, goes beyond the Board's requirement of "due diligence."

Second, it is clear that the union official in our case chose to work or to apply for work with the respondent employer partly because of its nonunion status. Thus, a position with an organized employer arguably is not "substantially similar" even though the actual job duties at unionized employers may be identical to the work which the agent may perform with a nonunion employer. As noted above, the definition of "substantially similar" work extends beyond the precise job duties involved. Moreover, the Board has held that a discriminatee need not compromise his or her union convictions, e.g., by engaging in strike breaking.

We distinguished those cases in which the Board has tolled backpay because a discriminatee engaged in a limited search for interim employment for "personal or no valid reasons that exclude jobs for which the discriminatee may otherwise be qualified." Florida Tile, supra, 310 NLRB at

609. The Board has held that a discriminatee failed to mitigate by (1) neglecting to look for work for which he or she was qualified: EDP Medical Computer Systems, Inc., 302 NLRB 54 (1991) (employee restricted search only to postage machine operator while qualified for other work); NHE/Freeway, Inc., 218 NLRB 259, 260 (1975), enfd. 545 F.2d 529 (7th Cir. 1976) (employee failed to look for nursing aide position for which she was trained); Knickerbocker Plastic Co., 132 NLRB 1209, 1219 (1961) (employee failed to search within his profession as molder). Cf. Aircraft and Helicopter Leasing, 227 NLRB at 645-46 (no failure to mitigate; construction job, rather than normal aircraft mechanic job, sufficiently lucrative); (2) limiting a job search to a segment of available employers: Heinrich Motors, Inc., 166 NLRB 783, 791-92 (1967), enfd. 403 F.2d 145 (2nd Cir. 1968) (willful failure to mitigate where automobile mechanic only applied at gas stations rather than car dealerships); and (3) declining a job offer because of a personal preference: Continental Insurance Co., 289 NLRB 579 (1988) (willful failure to mitigate where discriminatee declined job offer because of unwillingness to ride subway to work).

In our view, a union organizer's refusal to apply for positions at unionized companies does not constitute a "personal" preference resulting in a willful failure to mitigate. Compare Florida Tile, 310 NLRB at 613 (failure to apply to four specific companies is not willful failure to mitigate). The above cases concerning a discriminatee's limited job search, because of mere personal preferences, do not involve the requirements of a secondary job. Rather, the discriminatees themselves limited their job searches because of their own personal predilections, such as a desire to move into another line of work. In contrast, a union agent engaged in a "salting" campaign is constrained by his or her union employer from applying for work at a unionized company, i.e., the agent's secondary employer is the cause of the limited job search.

Applying these principles, we decided that the Union official here was entitled to a backpay award to remedy the Employer's unlawful refusal to hire him. The evidence established that the Union would have paid the official his full Union salary plus benefits had the Employer hired him. As set forth above, this situation was not materially different from the Board's traditional rules on moonlighting in which pay from the secondary employer does not offset gross backpay. Therefore, we rejected the argument that any backpay award should be tolled at some undefined point because the Union official would not voluntarily have remained employed with the Employer for the entire backpay period, but instead would have quit after an initial organizing period.

It is well-settled that, "the burden is on the employer who committed the unfair labor practice to establish facts that would reduce the gross amount of backpay owed." Florida Tile, 310 NLRB at 609, citing Chem Fab Corp., 275 NLRB 21 (1985); Kawasaki Motors Mfg. Corp. v. NLRB, 850 F.2d 524 (9th Cir. 1988). An employer satisfies its burden only upon presentation of probative evidence, not speculation or conjecture. See, e.g., Hansen Bros. Enterprises, 313 NLRB 599, 606 (1993) (employer did not meet its burden where record leads to speculation whether interim earnings were made during backpay period); Midwest Hanger, 221 NLRB 911, 918 (1975), mod. on other grounds 550 F.2d 1101 (8th Cir. 1977), cert. den. 434 U.S. 830 (1977) (employer's contention rejected as conjectural that because of high turnover discriminatee would have quit); McLoughlin Manufacturing Corp., 219 NLRB 920, 922 (1975) (same); J.H. Rutter-Rex Manufacturing Corp., 194 NLRB 19, 28 (1971), enfd. in pert. part 473 F.2d 223 (5th Cir. 1973), cert. den. 414 U.S. 822 (1973) (employer's contention rejected as "highly speculative" that discriminatee would have quit because of neck operation). For instance in Sure-Tan, Inc. v. NLRB, the Supreme Court reversed the Ninth Circuit's award of six months' minimum backpay for discriminatees who had been deported as undocumented aliens, stating that "a backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." 476 U.S. 883, 900 (1984) (emphasis in original). The Board similarly has declined to adopt a two year cap on backpay enunciated by the Seventh Circuit in Graves Trucking, Inc. v. NLRB for employees who have been psychologically disabled by their employers' unfair labor practices. 692 F.2d 470 (1982). See Greyhound Taxi, 274 NLRB 459 (1985), remanded sub nom. Wakefield v. NLRB, 779 F.2d 1437 (9th Cir. 1986), on remand 279 NLRB 1080 (1986) (Board permitted backpay for a period of five years).

Here, the Union's policy of keeping salting agents on salary was not restricted to organizing efforts of a certain duration. Rather, a Union business agent told the discriminatee simply that he would be on full Union salary during the salting campaign at a target contractor. The Employer brought forth no evidence to rebut that testimony. Furthermore, since no Union agent had been hired during a salting campaign, there was no past practice which would serve to limit the backpay period. Finally, we noted that the Employer itself could toll backpay at any time by making the discriminatee a job offer.

SECTION 10(J) AUTHORIZATIONS

During the fourth calender quarter of 1994, the Board authorized a total of 28 Section 10(j) injunction proceedings. Most of these cases fell within factual patterns set forth in General Counsel Memoranda 89-4, 84-7 and 79-77. As contemplated by those memoranda, these cases are described in the chart set forth below. For a fuller description of the cases categories, the reader is directed to General Counsel Memoranda 89-4, 84-7 and 79-77.

One case was somewhat unusual and therefore warrants special discussion.

The employer was an acute care hospital which had a long term collective-bargaining relationship with the union covering a unit of about 107 registered nurses (RNs). The parties' most recent labor contract expired in October 1994. During the summer of 1994, the employer informed the union that, in light of a recent U.S. Supreme Court decision,[1] it was withdrawing recognition from the union. Its action was based upon its belief that, under the Health Care decision, all of the employer's RNs were statutory supervisors under the Act, see Section 2(11), and that there was no longer a statutory bargaining obligation with the union. In addition to withdrawing recognition from the union, the employer had also implemented unilateral changes in the working conditions of the RNs and had stated its intent to grant them new benefits.

The Region had issued a Section 8(a)(5) complaint on the view that the registered nurses were not statutory supervisors and that the employer was thus not privileged to withdraw recognition from an incumbent union. The evidence indicated that the RNs had no power to hire or fire other employees, no authority to adjust grievances or impose discipline. The RNs also did not responsibly direct the work of other employees, as their direction of other nursing employees (LPNs and NAs) merely followed state guidelines and the RNs could not compel other nursing employees to perform their duties.

We concluded that interim relief was warranted under Section 10(j). Absent injunctive relief to restore the status quo, the union's employee support in the RN unit would clearly dissipate during the litigation of the administrative case. Moreover, the unit employees would lose the benefits of good faith collective bargaining in the

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[1] NLRB v. Health Care and Retirement Corp., __U.S.__, 114 S.Ct. 1778, 146 LRRM 2321 (May 23, 1994).

absence of union recognition. The need for interim relief was increased here as the employer had implemented unilateral changes in working conditions, had stated its intent to grant new benefits to unit employees and the parties' existing labor agreement had expired.

After the authorization of Section 10(j) proceedings, the employer agreed to recognize the union and to rescind all unilateral changes upon the demand of the union.

The 28 authorized cases fell within the following categories, as defined and described in General Counsel Memoranda 89-4, 84-7 and 79-77:

Category	Number of Cases in Category	Results
1. Interference with organizational campaign (no majority)	9	Won one case; two cases settled before petition; three cases settled after petition; lost two cases; one case is pending.
2. Interference with organizational campaign (majority)	1	Case is pending.
3. Subcontracting or other change to avoid bargaining obligation	2	One case settled after petition; one case is pending.
4. Withdrawal of recognition from incumbent	3	One case settled before petition; one case settled after petition; one case is pending.
5. Undermining of bargaining representative	6	Won one case; two cases settled before petition; one case withdrawn based on changed circumstances; two cases are pending.
6. Minority union recognition	0	- - - - -

7.	Successor refusal to recognize and bargain	3	One case settled before petition; one case settled after petition; one case is pending.
8.	Conduct during bargaining negotiations	1	Case settled after petition.
9.	Mass picketing and violence	1	Lost case.
10.	Notice requirements for strikes and picketing (8(d) and 8(g))	0	- - - - -
11.	Refusal to permit protected activity on property	0	- - - - -
12.	Union coercion to achieve unlawful purpose	0	- - - - -
13.	Interference with access to Board processes	0	- - - - -
14.	Segregating assets	2	One case settled before petition; one case withdrawn based on changed circumstances.
15.	Miscellaneous	0	- - - - -